

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE,                     )  
  )  
                  v.                                 )  
  )  
BRUCE R. BANTHER, JR.,                 )  
(ID. No. 9705000270)                     )  
  )  
                          Defendant.         )

*Submitted: April 19, 2006*

*Decided: July 18, 2006*

Robert J. O'Neill, Jr., Esq., and Stephen R. Welch, Jr., Esq., Dover, Delaware.  
Attorneys for the State of Delaware.

Kevin M. Howard, Esq., Young, Malmberg & Howard, Dover, Delaware and Edward  
C. Gill, Esq., Georgetown, Delaware. Attorneys for Defendant.

*Upon Consideration of Defendant's  
Motion to Dismiss the Indictment,  
or in the Alternative to Limit Evidence and Argument*

**Granted in Part**

**Denied in Part**

**VAUGHN, President Judge**

**ORDER**

Upon consideration of the defendant's motion to dismiss the indictment, or in the alternative, to preclude the State from presenting evidence or argument at trial from which the jury may infer that a conspiracy to commit murder existed between the defendant and John Schmitz, the State's opposition, and the record of the case, it appears that:

1. The defendant was indicted with a co-defendant, John Schmitz, on charges of Murder in the First Degree (intentional murder) and Conspiracy in the First Degree (conspiring with Schmitz to commit murder).<sup>1</sup> The trials of Banther and Schmitz were severed and Banther went to trial first. The jury found Banther guilty of Murder in the First Degree but acquitted him of Conspiracy.

2. Schmitz was scheduled to go to trial a few months later, but he ended his case by pleading guilty to a reduced charge of Manslaughter.<sup>2</sup>

3. On appeal, Banther's conviction was reversed and a new trial ordered due to juror issues not relevant to this motion.<sup>3</sup> At his second trial, Banther was again convicted of Murder in the First Degree.

4. Banther appealed his second conviction. On appeal, he contended that the

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<sup>1</sup> He was also charged with Possession of a Deadly Weapon During the Commission of a Felony, Forgery in the Second Degree and Theft. Those charges are not relevant to the motion.

<sup>2</sup> All other charges against him were dismissed after he entered his plea of guilty to manslaughter.

<sup>3</sup> *Banther v. State*, 823 A.2d 467 (Del. 2003).

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trial judge erred by allowing the State to offer evidence and argument that the defendant and Schmitz had agreed to plan to kill the victim, and by failing to excise the "agrees" element from an accomplice liability instruction. The Supreme Court reversed his conviction.<sup>4</sup> It held that the acquittal on the conspiracy charge at the first trial collaterally estopped the State from advancing an accomplice liability theory which was predicated on the defendant and Schmitz having worked together to kill the victim, or on the defendant having agreed to aid Schmitz in planning the murder. It also held that the accomplice liability instruction should have been tailored to exclude any reference to a bilateral agreement between the parties to kill the victim. The defendant is now back in this Court for a third trial.

5. The defendant first contends that the indictment must be dismissed. The theory of this contention is that: (1) the defendant and Schmitz were jointly indicted, in the same count, for murder in the first degree<sup>5</sup>; (2) this choice of how to indict the defendant makes it plain that on the face of the indictment, the State has alleged that the defendant acted either as a conspirator or by nature of an agreement with Schmitz as an accomplice in the intentional murder of the victim; (3) at the first two trials, the State's theory of the case, its evidence and its arguments to the jury were that the defendant and Schmitz agreed to act together and planned the murder together; (4)

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<sup>4</sup> *Banther v. State*, 884 A.2d 487 (Del. 2005).

<sup>5</sup> The indictment alleges that "John E. Schmitz and Bruce R. Banther, on or about the 12th day of February, 1997, in the County of Kent, State of Delaware did intentionally cause the death of Dennis J. Ravers."

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the Supreme Court has now established that the defendant cannot be convicted of murder on a theory, evidence or arguments that he agreed to aid Schmitz in planning or committing the offense; (5) under the Supreme Court's rulings the defendant can only be convicted on a theory that he acted on his own in planning and carrying out the murder; (6) there is insufficient evidence that the defendant planned and carried out the murder himself; (7) the evidence being as it is, the third trial will necessarily involve relitigating the same issues which the Supreme Court has determined cannot be relitigated; (8) and the State should not be permitted to "repackage" the same evidence in hopes that "with the appropriate spin," it can obtain a conviction within the boundaries set down by the Delaware Supreme Court. The defendant contends that if the motion to dismiss is not granted, the Court should enter an order precluding the State from introducing evidence or argument from which the jury may infer that a conspiracy to commit murder existed between the defendant and Schmitz.

6. After having carefully examined the Supreme Court's opinion, I find nothing therein which bars a retrial. I also find that the opinion does not bar an accomplice theory and instruction, if supported by the evidence, on the theory that the defendant's "actions alone, independent of any agreement or 'working with' Schmitz, constituted 'counsel[ing]' or 'attempt[ing] to aid" Schmitz.<sup>6</sup>

7. The crux of the defendant's motion is his argument that the State cannot or should not be permitted to proceed on a theory that the defendant independently

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<sup>6</sup> *Banther v. State*, 884 A.2d 487, 495 (Del. 2005).

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planned and committed the crime, or unilaterally aided Schmitz. Such an approach, the defendant argues, is inconsistent with the position the State took at the first two trials and with all the evidence. Only if some new evidence surfaced, he argues, to support such a theory, could the State so proceed.

8. Based upon my review of the record, however, I think that it is premature to conclude that the State cannot present a *prima facie* case that the defendant independently planned and committed the offense himself, or that he unilaterally became an accomplice of Schmitz without an agreement. I also conclude that the State is not estopped or otherwise prevented from proceeding on this basis. The State may argue all reasonable inferences which may flow from the evidence, subject now, of course, to the significant limitations imposed by the Supreme Court's opinion. If the State is unable to meet its burden, the defendant can make an appropriate motion at the conclusion of the State's case.

9. The contention that joint indictment of the defendants as described above commits the State to a theory that the defendant and Schmitz conspired to commit murder is unpersuasive. I find that it does not bar the State from proceeding on a theory that defendant independently planned and committed the crime, or unilaterally aided Schmitz.

10. As to the defendant's alternative request, I rule now that the State is precluded from arguing at trial that the defendant and Schmitz conspired or planned together in advance to murder the victim or that the defendant agreed to aid Schmitz in planning or committing the murder. To the extent that this ruling grants less than

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the defendant's full alternative request, it is without prejudice to the defendant to raise at trial any and all objections concerning argument, admission of evidence, or instructions which he believes would constitute error under the Supreme Court's opinion, as well as all other objections on any ground.

11. The defendant's motion to dismiss the indictment is ***denied***. The defendant's alternative request to preclude the State from presenting evidence or argument at trial from which the jury may infer that a conspiracy to commit murder existed between the defendant and Schmitz is ***granted in part*** as discussed above.

**IT IS SO ORDERED.**

/s/ James T. Vaughn, Jr.

President Judge

oc: Prothonotary

cc: Counsel

File